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# Constitutional and Practical Objections to the Exclusive Federal Regulation of Intrastate Railroad Rates

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# CONSTITUTIONAL AND PRACTICAL OBJECTIONS TO THE EXCLUSIVE FEDERAL REGULATION OF INTRASTATE RAILROAD RATES

IN considering the extent of the power possessed by the Congress of the United States to regulate the intrastate rates of railroads, it is well to remember that all of the power which it possesses in relation to that matter was granted to it in the following portions of Section 8 of Article 1 of the constitution of the United States:

"The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

It is at once apparent from a reading of the section in question, that the Congress is entirely without *express authority* to regulate intrastate commerce in any way. Such authority as it possesses over such commerce is entirely due to the necessity which has arisen of reconciling conflicts between the federal regulation of interstate commerce and the state regulation of intrastate commerce, in favor of the paramount authority.

Its extent depends, therefore, not upon a construction of the commerce clause of the constitution, but upon the length which the federal Supreme Court will consider it necessary to go in order to preserve, by judicial construction, the power thus expressly granted.

With that understanding of the situation, it is apparent that caution should be exercised in applying the language used in the decided cases to situations which are not in all substantial respects the same. The result of failing to do so is shown in connection with the question of the power of a state to regulate the rates of transportation on shipments, the points of origin and destination of which are both within a single state, but which pass through an adjoining state en route.

In the case of *Lehigh Valley R. R. v. Pennsylvania,*[1] it appeared that the state of Pennsylvania attempted to enforce a tax against the Lehigh Valley Railroad Company, basing the same,

[1] (1892) 145 U. S. 192, 36 L. Ed. 673, 12 S. C. R. 806.

in part, upon the gross earnings of business originating and terminating in that state, but passing through New Jersey en route. The right of the state to do this was contested upon the ground that it was in effect regulating interstate commerce. The court held otherwise, and, in sustaining the tax, said in its opinion:[2]

"The tax under consideration here was determined in respect of receipts for the proportion of the transportation within the state, but the contention is that this could not be done because the transportation was an entire thing, and in its course passed through another state than that of the origin and destination of the particular freight and passengers. There was no breaking of bulk or transfer of passengers in New Jersey. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same state, made interstate, because in its accomplishment some portion of another state may be traversed? Is the transmission of freight or messages between two places in the same state made interstate business by the deviation of the railroad or telegraph line on to the soil of another state?

"If it has happened that through engineering difficulties as the interposition of a mountain or a river, the line is deflected so as to cross the boundary and run for the time being in another state than that of its principal location, does such detour in itself impress an external character on internal intercourse? For example, the Nashville, Chattanooga & St. Louis Ry. Co. is a corporation created under the laws of Tennessee, and through freight and passengers transported from Nashville to Chattanooga pass over a few miles in Ala na and perhaps two miles in Georgia, but we had not supposed iat that circumstance would render the taxation of that company, in respect of such business, by the state of Tennessee invalid.

"So as to the traffic of the Erie Railway between the cities of New York and Buffalo, we do not understand that that company escapes taxation in respect of that part of its business because some miles of its road are in Pennslyvania, while the New York Central is taxed as to its business between the same places because its rails are wholly within the state of New York.

"It should be remembered that the question does not arise as to the power of any other state than the state of the termini, nor as to the taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, *but it is simply whether, in the carriage of freight and passengers between two points in one state, the mere passage over the soil of*

[2] (1892) 145 U. S. 192 (201), 36 L. Ed. 672, 12 S. C. R. 806.

*another state renders that business foreign, which is domestic. We do not think such a view can be reasonably entertained,* and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

It is true that the Lehigh Valley case involved a question of taxation and not a question of rate regulation. In another case the federal Supreme Court, however, had said:[3]

"It is impossible to see any distinction in its effect upon commerce of either class between a statute which regulates the charges for transportation and a statute which levies a tax for the benefit of the state upon the same transportation; and in fact, the judgment of the court in the State Freight Tax Case rested upon the ground that the tax was always added to the cost of transportation and thus was a tax in effect upon the privilege of carrying the goods through the state."

Following the decision in the Lehigh Valley case, a number of the state and federal courts applied the language of the opinion in that case to rate cases, and held that it was within the power of the states to regulate the rates on commerce between two points in the same state, even though the route, which it traversed, passed for a portion of the distance through an adjoining state.[4]

In *Campbell v. Chicago, Milwaukee & St. Paul R. Co.,* it was held that the Railroad and Warehouse Commission of that state had a right to regulate the rates on traffic between Beloit, Iowa, and Sioux City, Iowa, although the railroad between the two cities ran through the state of South Dakota for a little less than half of the total distance and crossed the boundary of the state four times. In its opinion the court said:[5]

"The question presented for our determination is whether freight shipped from Beloit to Sioux City over the railway described, is interstate commerce within the meaning of that provision of section 8 of article 1 of the constitution of the United States, which reads as follows: 'The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian Tribes.' " "In construing the constitutional provision under consideration, the court, in *Gib-*

[3] Wabash, etc., R. Co. v. Illinois, (1886) 118 U. S. 557 (570), 30 L. Ed. 244, 7 S. C. R. 4.

[4] Some of the cases which so held were: Campbell v. Chicago, etc., R. Co., (1892) 86 Ia. 587, 53 N. W. 351, 17 L. R. A. 443; State ex rel. R. R. Commissioners v. Western Union Telegraph Co., (1893) 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570; Seawell v. Kansas City, etc., Ry. Co., (1893) 119 Mo. 222, 24 S. W. 1002; United States ex rel. Kellogg v. Lehigh Valley R. Co., (1902) 115 Fed. 373.

[5] (1892) 86 Ia. 587 (589), 53 N. W. 351, 17 L. R. A. 443.

*bons v. Ogden,* 22 U. S. 9 Wheat. 189, 6 L. Ed. 68, defined commerce as follows: 'Commerce undoubtedly is traffic, but it is something more; it is intercourse. It described the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' The language last quoted was used to refute the claim that the commerce contemplated by the constitution was mere traffic, the buying and selling or the interchange of commodities; but it was quoted with approval by the court which used it in the recent case of *Lehigh Valley R. Co. v. Pennsylvania,* 145 U. S. 192, 36 L. Ed. 672, 4 Inters. Com. Rep. 87, and applied to facts similar to those under consideration. The question involved in the case last cited was whether the state had the power to levy and collect a tax on the gross earnings of a railway for the continuous transportation of passengers and freight from points in Pennsylvania to other points in the same state, over a line of railway which passed from that state to another and back. It was held that such transportation was not interstate commerce within the meaning of the federal constitution, and that the tax was valid. Since the question under consideration is a federal one, the decision last cited is decisive of it. Following that decision, we hold that the continuous transportation of articles of commerce from Beloit to Sioux City over the line of railway described is not interstate commerce, and that the statute under which the schedule of rates in question was made is not unconstitutional, so far as it has been questioned on this appeal. The board of railroad commissioners were authorized to make a schedule of reasonable maximum charges for the continuous transportation of freight from points in this state to other points in this state over a railway partly in another state."

The case of *State v. Western Union Teleg. Co.,* was a case in which the authority of the State Board of Railroad Commissioners to regulate the rates on telegraph messages between two points in the state, but which passed through Virginia en route was involved. The supreme court of North Carolina held that the Board had such authority. In passing upon the point it said:[6]

"Without attempting to discuss these cases, and to distinguish them in some particulars from ours, it is sufficient to say that if they are not distinctly overruled, their principle is certainly in conflict with the reasoning of the opinion of the Supreme Court of the United States (Fuller, C. J.) in *The Lehigh Valley Railroad Co. v. Pennsylvania,* 145 U. S., 192.

"The State of Pennsylvania levied a tax on the gross receipts of all railroad companies derived from the transportation by continuous carriage from points in Pennsylvania to other points in

[6] (1893) 113 N. C. 213 (223), 18 S. E. 389, 22 L. R. A. 570.

the same state—that is to say, passing out of Pennsylvania into other states and back again into Pennsylvania in the course of transportation.

". . . . The Court sustained the tax, and although it may be said that the decision relates only to that part of the receipts which arose from the transportation within the state, yet it must be apparent from a perusal of the opinion that this conclusion was reached on the ground that such continuous transportation was not interstate commerce. Indeed the entire course of the reasoning of the court is in support of this very principle, and is clearly applicable to the question involved in this appeal. The language of the court is plain and emphatic, and we do not feel at liberty to ignore it and especially when it is applied to telegraphic communication, under the peculiar circumstances of this case. . . . It is in evidence that the defendant owns and operates a continuous wire, or system of wires, from the offices mentioned to other points in North Carolina, and therefore it is not compelled to transfer its business to any other agency outside of North Carolina in order that it may reach its destination in this state. In this respect our case is stronger than the one from Pennsylvania, as the road from Phillipsburg to Philadelphia was owned and operated by another corporation, and not by the Lehigh Valley Railroad Company. We refrain from entering into an extended discussion of the subject, and are content to follow the reasoning of the Supreme Court of the United States, whose authority upon such questions is conclusive.

"We will observe, however, that we think the principle laid down by that Court is peculiarly adaptable to cases like the present, in which there is such an exceptional facility for the evasion of state authority to fix the rate of charges. This may be done in an instant and without expense by so adjusting the wires that messages must go through a part of the territory of another state. We think the exception should be overruled."

In *Seawell v. Kansas City, etc., Ry. Co.,* it appeared that a railroad company had been charging more for transporting coal from Carbon Center to Kansas City than from Liberal and Minden to Kansas City, although the distance from Kansas City to Carbon Center was less than the distance from Kansas City to either Liberal or Minden. All of the towns were in the state of Missouri. This was claimed to be a violation of the state law and a shipper brought an action under the statute to recover treble the amount of his damages. The railroad line, between the towns in question and Kansas City, ran for the greater portion of the distance through the state of Kansas; and it was therefore claimed that traffic over it was interstate commerce and not affected by the state law.

In overruling this objection and affirming the judgment for the plaintiff the supreme court of Missouri, after discussing, at considerable length, the federal and Missouri laws and many of the cases said:[7]

"The Supreme Court of the United States has never held that this was interstate commerce, even when such continuous transportation was partly through the limits of another state, but to the contrary."

Then in pointing out the applicability of the decision in the *Lehigh Valley Railroad Co.* case, it said:[8]

"It would seem that this ruling is directly in point in the present case, when it is remembered that the question here is not as to the power of any other state than the state of the termini, nor as to the regulation of the operations of the defendant or any other company's road elsewhere than in Missouri, for by its terms this statute can only operate between points in the state of Missouri."

Then came the case of *Hanley v. Kansas City Southern Ry. Co.*, in which the federal Supreme Court held that the transportation of goods on a through bill of lading from Fort Smith, Arkansas, to Grannis, Arkansas, a total distance of 116 miles, of which 52 miles were in Arkansas and 64 miles in Indian Territory, was interstate commerce and free from interference by the state of Arkansas. As one of the reasons for so holding, the Court, in its opinion, said:[9]

"The present railroad gets the authority for its line in the Indian Territory, through a predecessor in title, from an act of Congress of 1893, c. 169, 27 Stat. 487, and that, by that act, Congress 'reserved the right to regulate the charges for freight and passengers on said railroad . . . until a state government shall be authorized to fix and regulate the cost,' etc.; 'but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railroad or said company whenever such transportation shall extend from one state into another, or shall extend into more than one State.' "

However the Court quoted with approval the following language of Justice Field in the case *P. C. Steamship Co. v. Railroad Commissioners*:[10]

"To bring the transportation within the control of the state, as part of its domestic commerce the subject transported must be within its entire length under the exclusive jurisdiction of the Court."

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[7] (1893) 119 Mo. 222 (238), 24 S. W. 1002.
[8] (1893) 119 Mo. 222 (240), 24 S. W. 1002.
[9] (1903) 187 U. S. 617 (619), 47 L. Ed. 333, 23 S. C. R. 214.
[10] (1883) 9 Sawyer (U. S. C. C.) 253, 18 Fed. 10.

It will be noticed that the Hanley case possesses essential facts peculiar to itself. Notwithstanding that fact, a number of the state courts, relying upon the general statement of the law, have accepted it as an authority requiring them to hold that all commerce between two points in the same state, but passing over the Territory en route, is interstate.

A notable exception, however, is the supreme court of Virginia. In a case decided by it, since the decision of the Hanley case, it was held that where the initial and terminal points of a telegram were both within that state, and it was transmitted over the wires of a single company and concerned only citizens of that state, the message was a domestic one, and its character, as such, was not affected by the circumstances that the line passed in part over the territory of West Virginia, or that the company had established a relay office in such other state at which the message was lost. In its opinion, the court said:[11]

"The case in judgment, in our opinion, involves the exercise of an important police power of the state, a power which ought not to be surrendered, and which we are unwilling to surrender, in the absence of a direct and authoritative declaration on the part of the Supreme Court of the United States that it is violative of the federal constitution."

It is improbable that the cases, above mentioned, which were decided in reliance upon the language used in the *Lehigh Valley case* and those decided in reliance upon the language used in the *Hanley case,* were all correctly decided. Yet, they were equally well supported by the general statements in those opinions.

These cases we believe illustrate the danger of seizing on statements of a general nature in a decision and applying them to dissimilar facts. The statement in the *Lehigh Valley case* that: . . . "The question . . . is simply, whether in the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state renders that business foreign, which is domestic. We do not think such a view can be reasonably entertained;" and the statement in the *Hanley case,* that; "To bring the transportation within the control of the state, as part of its domestic commerce the subject transported must be within its entire length under the exclusive jurisdiction of the Court;" are apparently irreconcilable.

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[11] Western Union Telegraph Co. v. Hughes, (1905) 104 Va. 240 (242). 51 S. E. 225.

While it may be that the federal Supreme Court will hold, when a proper case is presented to it, that a state is without control over the rates to be charged by a carrier on shipments between two points in the same state, where the major part of the route is within the state, and where the diversion into another state is purely incidental, it has not done so yet. Until it renders such a decision it would be unwise to conclude prematurely that such is the law. Especially is this true when the result of such premature conclusion would be to divest the various states of an important element of police power.

We will now consider the cases in which the federal Supreme Court has considered and passed upon the question of the extent to which Congress has the power to regulate purely intrastate rates. The first case is that of *Houston, etc., Ry., Co. v. United States,*[12] known as the *Shreveport Case.* In that case the question under consideration was the validity of an order of the Interstate Commerce Commission. The Commission found that an unlawful discrimination existed between the class rates established by the Railroad Commission of Texas, between certain points in that state, and the rates established by the Interstate Commerce Commission between Shreveport, Louisiana, and the same points in Texas. The carriers were directed to desist from charging higher rates for transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points, than were contemporaneously charged for the carriage of such commodity from Dallas and Houston toward Shreveport for equal distances. The decree of the Commerce Court, sustaining the order of the Commission was sustained.

In that case it was held:

1. Under the commerce clause of the constitution Congress has ample power to prevent the common instrumentalities of interstate and intrastate commerce, such as the railroads, from being used in their intrastate operations in such a manner as to affect injuriously traffic which is interstate.

2. *Where unjust discrimination against interstate commerce arises out of the relation of intrastate to interstate rates* this power may be exerted to remove the discrimination, and this whether the intrastate rates are maintained under a local statute or by the voluntary act of the carrier.

3. In correcting such discrimination Congress is not restrict-

[12] (1914) 234 U. S. 342, 58 L. Ed. 1341, 34 S. C. R. 833.

ed to an adjustment or reduction of the interstate rates, but may prescribe a reasonable standard to which they shall conform and require the carrier to adjust the intrastate rates in such a way as to remove the discrimination; for *where the interstate and intrastate transactions of carriers are so related that the effective regulation of one involves control of the others, it is Congress, and not the state, that is entitled to prescribe the dominant rule.*

That case does not hold that the Interstate Commerce Commission has the same control over intrastate rates that it possesses over interstate rates. Such a conclusion is both unwarranted and extravagant. Such control was only held to extend to intrastate rates which were so related to interstate commerce as to cause an unjust discrimination against the same.

In the case of *American Express Co. v. South Dakota ex rel. Caldwell,* a distinction was made between intrastate rates which were established by the carrier and those established by the state. In its opinion the Court said:[13]

"Where a proceeding to remove unjust discrimination presents solely the question whether the carrier has improperly exercised its authority to initiate rates, the Commission may legally order, in general terms, the removal of the discrimination shown, leaving upon the carrier the burden of determining also the points to and from which rates must be changed, in order to effect a removal of the discrimination. But where, as here, there is a conflict between the federal and the state authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under state authority, *unless, and except so far as, it is definite as to the territory or points to which it applies, for the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic.*"[14]

The case of *Illinois Central Railroad Co. v. Public Utilities Commission of Illinois et al,* decided by the federal Supreme Court on January 14th, 1918, arose out of an alleged discrimination against the cities of St. Louis and Keokuk caused by the fact that the intrastate passenger rates in Illinois were on a basis of 2 cents per mile while the interstate rates in that territory were on a 2½ cents per mile basis. The Interstate Commerce Commission made an order requiring the carriers to remove the discrimination. After various proceedings in the lower courts the case was finally

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[13] (1917) 244 U. S. 617 (625), 61 L. Ed. 1352, 37 S. C. R. 656.

[14] Italics are the author's. [Ed.]

taken to the federal Supreme Court. In its opinion that Court said:[15]

"The parties differ widely about the scope of the order. The carriers assert that it covers every intrastate passenger rate in Illinois, is addressed to the removal of discrimination found to be state-wide, and gives ample authority for increasing all rates from points in Illinois from 2 cents to 2.4 cents per mile. On the other hand the state authorities assert that it is not state-wide and that the extent to which it is intended to affect the state-made rates is so indefinite and vaguely stated, as to make it inoperative and of no effect."

In considering the validity of the order, it was said:

"To be effective in respect of intrastate rates established and maintained under state authority an order of the Commission of the kind now under consideration must have a definite field of operation, and not leave the territory or points to which it applies uncertain . . .

"In construing federal statutes enacted under the power conferred by the commerce clause of the constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even when that may be done, unless, and except so far as, its purpose to do so is clearly manifested. *Reid v. Colorado,* 187 U. S. 137, 148; *Cummings v. Chicago,* 188 U. S. 410, 430; *Savage v. Jones,* 225 U. S. 501; *Missouri, Kansas & Texas Ry. Co. v. Harris,* 234 U. S. 412, 419. This being true of an act of congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty.

"We conclude that the uncertainty in this order is such as to render it inoperative and of no effect as to the intrastate rates, established and maintained under a law of the state, and therefore that the suits by the carriers were rightly dismissed on the merits."

These cases do not warrant the statement that Congress is vested with power to regulate all intrastate rates. On the contrary they only pass upon the authority of the Interstate Commerce Commission, under the act to regulate commerce, and hold that such authority only extends to the regulation of such particular intrastate rates as are clearly shown to discriminate against interstate rates. Of the multitude of intrastate rates the number which could be so held is obviously but a small part.

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[15] (1918) 38 S. C. R. 170 (175), U. S. Adv. Ops. 1917 p. 204.

It is only where the relationship between the two classes of rates renders a single control imperative that congressional control may be exercised. The rest of the intrastate field is left to the states. This is clearly shown by the recent decision of the federal Supreme Court, in the case of *Chicago, Milwaukee & St. Paul Ry. Co. v. Public Utilities Commission of Illinois,* in which it was said:[16]

"The contention based upon an interstate commerce element in a rate, that is, the relation of interstate and intrastate rates and their reciprocal effect, was at one time quite formidable, but since the *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, its perplexity, arising from a conflict of powers has been simplified. *In those cases it was decided that there is a field of operation for the power of the state over intrastate rates and the power of the nation over interstate rates.* In other words, and in the language of Mr. Justice Hughes who delivered the opinion of the Court; 'the fixing of reasonable rates for intrastate transportation was left where it had been found; that is; with the states and the agencies created by the states to deal with that subject (*Missouri P. R. Co. v. Larrabee Flour Mills Co.,* 211 U. S. 612, 63 L. Ed. 352, 29 Sup. Ct. Rep. 214)', until the authority of the state is limited 'through the exertion by Congress of its paramount constitutional power *where there may be a blending of interstate and intrastate operations of interstate carriers.*' "[17]

Inasmuch as the power and authority to remove discriminations existing between interstate and intrastate rates is now vested in the Interstate Commerce Commission, the need for further federal control of intrastate rates is not apparent. There is, however, a fully organized movement, having for its object nothing less than the absolute elimination of the states and the state commissions from all jurisdiction over intrastate rates of the railroads. The success of such a movement would, of course, deprive the states of their control, even within the somewhat restricted field which the decisions of the federal Supreme Court have now left to them.

At the time the Act to regulate commerce was enacted such a proposition would have been promptly rejected as plainly violative of the federal constitution. The recent decisions of the Supreme Court of the United States, however, have somewhat encouraged the view that, under the commerce clause of the constitution, the

[16] (1917) 242 U. S. 333, 61 L. Ed. 341, 37 S. C. R. 173.
[17] Italics are the author's. [Ed.]

Congress may have the necessary power. It therefore becomes important to consider the plan which the proponents of such action wish to see adopted and to consider the objections thereto.

For a statement of the plan and a consideration of the objections to its adoption, I have taken the liberty of quoting from an address, which was delivered in November, 1916, before the National Association of Railway Commissioners, at its annual convention in Washington, by Hon. Robert R. Prentis, the President of the Association. At the time the address was delivered, Mr. Prentis had been appointed and is now acting as one of the Justices of the supreme court of appeals of the state of Virginia. The quotation is as follows:

"This plan embodies two main features:

"First: That there be a federal incorporation law, under which every railway company in this country which is engaged in interstate commerce, and all of them will be construed to be so engaged, shall be required to incorporate. Such companies are to be given no option as to this, but incorporation under the proposed act of Congress is to be made compulsory, and thus the entire control of such companies, including their rates, intra and interstate, and their stock and bond issues, is to be vested in the agencies of the federal government.

"Second: Then it is proposed that in place of the Interstate Commerce Commission there shall be two commissions. One to be called the Interstate Commerce Commission, which is to be the supreme body, in charge of all the powers of regulation, on appeal as to some of such powers, and directly as to others. Another commission is to be organized, which it is suggested shall be known as the Federal Railroad Commission, whose members shall be presidential appointees. This new commission is to be vested with the power and charged with the duty of detection, correction, and prosecution, and those feeling aggrieved by their conclusions are to have the right to have them reviewed by the Interstate Commerce Commission.

"In addition to these two great organizations they propose, as a method of getting closer to the people in the various sections of the country, and as a substitute for the present state commissions, that there shall be regional boards in every transportation region that the Congress may divide the country into; that their offices shall be in such localities. These bodies to be authorized to take evidence as to all the graver and more important questions which remain within the jurisdiction of the Interstate Commerce Commission, including the making of rates and the establishment of proper relations of rates between localities; they are also to take evidence in any case that shall be pending before the Interstate Commerce Commission as commissioners

in chancery would do, reporting their conclusions to the Interstate Commerce Commission, subject to exception; the orders and conclusions of these regional boards, if not excepted to, are to be effective without further action by the Interstate Commerce Commission, unless that Commission should itself see some reason for ordering rehearings. If they are excepted to by shippers, representatives of localities or by the carriers then such differences are to be argued before and settled by the Interstate Commerce Commission.

"This plan, as will be observed, is most ambitious, and the manifest purpose of this vast machinery to be organized under federal legislation is to relieve the railway companies from any effective supervision by the states . . .

". . . It seems to me that this proposition, considered in its entirety, is in the highest degree unwise, and that its effect will of necessity be retrogressive instead of progressive.

"Most of the true progress of this world is made, not by tearing down, but by building up, by construction, not by destruction.

"For thirty years the federal and state governments have been enacting laws and administering them with the view of exercising efficient control over the rates and practices of the railroads. A long catalogue of the benefits which have arisen from such regulation can easily be made. Forty-six states of the Union at great expense have organized commissions for the purpose of controlling intrastate rates, and exercising their constitutional powers hitherto conceded to them. The proposition is to take over all the important jurisdiction of these local commissions and concentrate the power in two federal commissions in the city of Washington. Then, knowing that the Interstate Commerce Commission is already overwhelmed with its work, and apparently realizing the utter futility of expecting central commissions in Washington to deal effectively with all of the many and varied questions that arise locally all over the country, it is proposed to establish regional boards in various sections of the country which shall be subordinate to the central authority at Washington. In other words they see that just as soon as they tear down the existing system they must immediately commence to rebuild a vast hydra-headed administrative bureau, with two big heads and many small ones, which will correspond in many particulars with the very organization we already have.

"It is impossible for me to escape the conclusion that if these suggestions shall be adopted the cause of public regulation will be practically just where it was thirty years ago. It seems to me that experience has demonstrated that all the powers of all the states combined with all the powers of the federal government must be exercised if public regulation is to be effective.'

"The slogan or shibboleth of those antagonistic to state regu-

lation is, that they have forty-nine masters, that is, that forty-eight states and the federal government are all regulating them at the same time. Let us examine these catch words for a moment. Possibly in the heat of argument exaggeration may be excused, but what railroad in this country runs through forty-eight states? May we not at once say then without hesitation that no railroad in this country has forty-nine masters. Their masters in this sense of the word are the federal government as to matters referring directly to interstate commerce, and as to local matters and intrastate commerce those states only in which they are located and doing business. Then again, have they any more masters than every other citizen of this country? When I travel from Virginia to California I am subject to the laws of the federal government all the time, and from time to time subject to the laws of the state in which I happen to be travelling. Some of the large private corporations do business in as many states, or more, as any large railroad system. Have the railroads any more masters than such corporations, which are subject to the federal law, and at the same time are subject to the laws of the various states in which they do business and by which they are protected? They have one master—the law, and the sovereignty of the law is, and should be, master of us all.

"Tested in this way it may be said to be simply an attack upon, and criticism of, our form of government.

"That is to say that the framers of the federal constitution were not wise when they adopted the form of government which provides for the dual state and federal sovereignty; that the encomiums bestowed upon this federal system of ours by students of political history are all based upon erroneous conceptions of its value; that the imitations of it by other nations in their struggles for political freedom have been undertaken without due consideration and are unwise; that the magnificent progress which we have made during the one hundred and twenty-nine years of its existence owes nothing to our governmental system,—indeed that all the lessons of the remote and recent past are to be forgotten in our thoughtless and headlong rush in the name of progress, towards centralized power and bureaucratic government.

"Possibly this process of centralization of authority in the federal government at Washington is to go on, with accelerated pace in the future, but if so let us fully realize what we are doing. Let us not close our eyes to the fact that if those who believe in thus changing the form of our government succeed in their efforts then that change will be radical and far-reaching, and let us quit boasting of the wisdom of our fathers in providing that form of government which they evidently intended when they adopted the United States constitution.

"If the mature judgment of our nation is that we have made a serious mistake in the form of our government let us meet the

situation frankly and without subterfuge, let us amend the constitution and abolish state control over local affairs, and cease our labored and dubious reasoning in our efforts by construction to enlarge the plain provisions of the federal constitution.

"I commend to the Congress and to the Railway Executive Committee these weighty and carefully considered words of that master of logic and diction, the Hon. Elihu Root, taken from his recent annual address as President of the American Bar Association.

"After referring to the necessity of developing our vast new body administrative law, and calling attention to the fact that it is still in its infancy and still crude and imperfect, he says:

" 'The development of our law under the conditions which I have pointed out will be accompanied by many possibilities of injurious nature. There will be danger that progress will be diverted in one direction and another from lines really responsive to the needs of the people, really growing out of their institutions, and will be attempted along the lines of theory devised by fertile and ingenious minds for speedy reforms. Ardent spirits, awakened by circumstances to the recognition of abuses, under the influence of praiseworthy feeling often desire to impose upon the community their own more advanced and perfect views for the conduct of life. The rapidity of change which characterizes our time is provocative of such proposals. The tremendous power of legislation, which is exercised so freely and with little consideration in our legislative bodies, lends itself readily to the accomplishment of such purposes. Sometimes such plans are of the highest value. More frequently they are worthless and lead to wasted effort and abandonment. The test of their value is not to be found in the perfection of reason. Man is not a logical animal, and that is especially true of the people of the United States and the people of Great Britain, from whom our methods of thought and procedure were derived. The natural course for the development of our law and institutions does not follow the line of pure reason or the demands of scientific method. It is determined by the impulse, the immediate needs, the sympathies and passions, the idealism and selfishness, of all the vast multitudes who are really from day to day building up their own law.'

"Pursuing the same line of thought he says:

" 'There will always be danger of developing our law along lines which will break down the carefully adjusted distribution of powers between the national and state government. Upon the preservation of that balance, not necessarily in detail but in substance, depends upon one hand, the preservation of that local self-government which in so vast a country is essential to real liberty.'

"Then growing impassioned he concludes his thought upon this general subject with this dire prophecy:

" 'And if the process goes on our local governments will grow weaker and the central government stronger in control of local affairs until local government is dominated from Washington by the votes of distant majorities indifferent to local customs and needs. When that time comes the freedom of adjustment which preserves both national and local liberty in our system, will be destroyed and the breaking up of the Union will inevitably follow.'

"Recollect, these are not the words of a swashbuckling Southerner, but they are the words of Honorable Elihu Root.

"When this association was organized under the guiding hand and inspiration of Judge Cooley, the first chairman of the Interstate Commerce Commission, as its president, and at its first meeting in this city on the fifth day of March, 1889, he emphaszied the need for co-operation and concert of action between the Interstate Commerce Commission and the State Railroad Commissions, and this doctrine has been continuously emphasized by all of our leaders from that day to this. The most serious complaint now made of the present system is the lack of uniformity, growing out of the differing legislation of the Congress and the states, as well as the differing legislation of various states, and yet the proposition is that in order to secure uniformity the very agency through which such uniformity as does exist has, in great measure, been secured, must be destroyed.

"Every important question involving the regulation of the railways, almost without exception, has been first proposed, argued and debated upon the floor of this association. Following these debates has come practically every amendment of the act to regulate commerce, and in almost every instance a number of the states of the Union adopted similar legislation before it had been adopted by the Congress.

"This Association has not simply advocated and favored uniformity as a sentiment. It has done much of importance to promote uniformity. To enumerate: The accounting methods of the railways and of making the annual operating reports has been greatly improved, and is practically uniform throughout the country, so that they now know more about their own business than they ever knew before; the safety appliance laws have been enacted. Such slow progress as has been made in classification owes much to the insistence and persistence of this Association; the demurrage rules which are now practically uniform throughout the country, were framed by a committee of this Association under the chairmanship of the Hon. Franklin K. Lane, then a member of the Interstate Commerce Commission; this is true also of the express rates, not long since in a state of confusion, which are also now practically uniform throughout the country. At this very session of this Association much progress will be reported in bringing about uniformity in the elimination of dangerous crossings and the precautions to be taken at crossings.

The list might be prolonged to cover almost every phase of public regulation, and I cannot conceive of any better method under our dual form of government for the creation of nation-wide sentiment for the promotion of uniformity of legislation and practice than the maintenance of the state commissions, with unimpaired powers, and of this Association with all of its activities.

"The charge of lack of uniform laws in this great country may doubtless be sustained by reference to a number of laws passed by the various states, but notwithstanding these laws we may safely venture to say that uniformity has been greatly promoted since the federal and state governments began to exercise their powers as well as by such exercise, and that it exists today in a far greater degree than formerly, when each railway company was free to compete with every other and to make its own rules and regulations. While there may be some glaring exceptions, it is unquestionably true that the great work of this Association from its beginning to this day has been in the promotion and securing of uniform laws, federal and state, and uniform regulation, and there has never been a year since its organization that substantial progress has not been made. If the state commissions are shorn of their powers the cause of regulation will be hindered and not promoted."

It must be apparent from the foregoing that the cause of regulation has been advanced, not retarded, under the present system. That some form of local supervision and control is necessary to meet the public needs is tacitly admitted by the carriers themselves. This is shown by the plan which Mr. Prentis has outlined. It is in reality the plan of the Railway Executive Advisory Committee—a committee composed of executive officials of a number of railroads, and representing slightly more than eighty-three per cent of the railway mileage of the United States.

The railroad commissions of the various states have long been exercising this power. They are each acquainted with the conditions existing in their own state; they are in a position to act expeditiously on matters coming before them; they are responsible to all of the citizens of the state for their actions.

The regional boards would not be so well acquainted with local conditions. There would be more delay in obtaining relief through them, as their reports would go to the Interstate Commerce Commission for final action. This delay and the necessary additional expense would, in many cases, deter citizens from filing meritorious complaints. Then, too, the regional boards would only be responsible to the persons appointing them.

Under these circumstances, and entirely aside from the grave constitutional question involved, it would seem to be advisable to

continue to maintain and develop the present effective system of intrastate rate regulation rather than to adopt this new system which possesses so many obvious disadvantages, without any compensatory advantages.

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